Goldart Sdn Bhd v Yong Toong Wah

HIGH COURT (PULAU PINANG) — ORIGINATING MOTION NO 25–7 OF 2003
KAMALANATHAN RATNAM J
19 NOVEMBER 2003

Administrative Law — Judicial review — Remedies — Application for certiorari — Industrial Court — Whether Industrial Court erred in its decision — Whether decision to be quashed

Labour Law — Employment — Termination of services — Performance — Whether allegation of poor work performance substantiated

Labour Law — Employment — Termination of services — Refusal to accede to transfer order — Whether employer has absolute discretion to implement order for transfer — Whether such order tainted with bad faith

Labour Law — Employment — Termination of services — Resignation — Whether letter of resignation falsely procured

The respondent was an employee of the applicant at the material time. The former alleged that he had been unfairly dismissed by the applicant. Three grounds were advanced by the applicant in attempting to justify the respondent's dismissal, ie: (i) that the respondent had refused to comply with a valid transfer order; (ii) that the respondent had voluntarily resigned upon tendering his resignation letter; and (iii) that the respondent was an under-achiever. Regarding the first allegation, the respondent submitted that the applicant had not settled moneys owing to him prior to the transfer order and attempts to clarify this matter were ignored. On the second allegation, the respondent testified that the company had previously asked him sign on a blank sheet of paper and had used it to insert his intention to resign without his knowledge. Regarding the third allegation, the issue that was raised concerned the applicant's intention to send the respondent for training prior to his dismissal. The matter was heard by the Industrial Court which held that the claimant had been unfairly dismissed. Dissatisfied, the applicant applied to the High Court for order of certiorari to quash the said decision.

Held, dismissing the application:

(1) If the applicant was sincere in its transfer order with no malicious intent motivating it, then there was no reason to withhold the respondent's due commissions and salary, besides asking the respondent to advance first the employer's share of the EPF contribution. Any ambiguity must be construed in the respondent's favor. The respondent was justified in refusing to go on the transfer until all his dues had been paid more so upon the ambiguous letters of the applicant to the respondent which failed to state with clarity that all dues due to the respondent would be paid when he reported for duty at Johor Bahru (see paras 3, 5).

(2) Based on the facts, the applicant had used the respondent's pre-signed blank sheet of paper as the respondent's resignation letter. Therefore, the respondent had not resigned voluntarily but that he was dismissed (see para 14).

(3) As the applicant admitted to issuing the transfer order to Johor Bahru because to facilitate the respondent's training there, the plea that the poor work performance of the respondent was one of the grounds for dismissal was wholly inconsistent. The applicant was willing to continue to employ the respondent, albeit, in Johor Bahru. The Industrial Court was correct rejecting the allegation of poor performance as it was only given as a possible excuse of why the claimant had resigned. The question of the respondent's non-performance is certainly not an issue for dismissal in this case (see para 15, 17).

[**Bahasa Malaysia summary**

Responden adalah seorang pekerja pemohon pada masa matan. Responden telah mendakwa bahawa beliau telah dipecat dengan tidak adil oleh pemohon. Tiga sebab telah dikemukakan oleh pemohon dalam percubaan untuk menjustifikasikan pemecatan responden, iaitu: (i) bahawa responden telah enggan mematuhi satu perintah pemindahan yang sah; (ii) bahawa responden telah dengan suka rela berhenti kerja setelah menenderkan surat berhenti kerja; dan (iii) bahawa responden seorang pekerja berprestasi rendah. Berhubung pengataan pertama, responden telah berhujah bahawa pemohon tidak menyelesaikan wang yang terhutang kepadanya sebelum perintah pemindahan tersebut dan percubaan untuk menjelaskan perkara ini tidak diendahkan. Berhubung pengataan kedua, responden telah membuat keterangan bahawa syarikat telah sebelum ini meminta beliau menandatangani satu kertas kosong dan telah menggunakannya untuk memasukkan hasratnya untuk berhenti kerja tanpa pengetahuannya. Berhubung pengataan ketiga, persoalan yang telah ditimbulkan adalah berkaitan hasrat pemohon untuk menghantar responden untuk latihan sebelum pemecatannya. Perkara tersebut telah didengar oleh Mahkamah Perusahaan yang memutuskan bahawa penuntut telah dipecat secara tidak adil. Berasa tidak puas hati, pemohon telah memohon ke Mahkamah Tinggi untuk satu perintah certiorari untuk membatalkan keputusan tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Jika pemohon jujur dalam perintah pemindahannya tanpa niat jahat yang mendorongnya, maka tiada sebab untuk tidak memberikan komisen dan gaji responden yang perlu dibayar, selain daripada meminta responden untuk mendahulukan bahagian sumbangan KWSP majikan. Apa-apa ketaksaan harus ditafsirkan menyebelahi responden. Responden telah menjustifikasikan keengganannya untuk dipindahkan sehingga semua wang yang perlu dibayar kepadanya dibayar berdasarkan surat-surat yang taksa pemohon kepada responden yang telah gagal untuk menyatakan dengan jelas bahawa semua wang yang terhutang kepada responden akan dibayar apabila beliau melaporkan diri untuk bertugas di Johor Bahru (lihat perenggan-perenggan 3,5).

(2) Berdasarkan fakta-fakta berikut, pemohon telah menggunakan kertas kosong yang telah ditandatangani oleh responden sebagai surat berhenti kerja responden. Oleh itu, responden tidak berhenti kerja secara suka rela tetapi beliau telah dipecat (lihta perenggan 14).

(3) Memandangkan pemohon telah mengaku mengeluarkan perintah pemindahan ke Johor Bahru kerana dapat memberikan responden latihan di sana, pli bahawa prestasi kerja lemah responden adalah salah satu daripada alasan untuk pemecatan adalah tidak konsisten langsung. Pemohon bersedia untuk terus menerima responden bekerja, walaupun, di Johor Bahru. Mahkamah Perusahaan bertindak betul menolek pengataan prestasi lemah tersebut kerana ia hanya diberikan sebagai alasan yang mungkin kenapa penuntut telah berhenti kerja. Persoalan tentang prestasi kerja lemah responden sememangnya bukan satu persoalan untuk pemecaan dalam kes ini (lihat perenggan-perenggan 15, 17).]

Notes

For cases on remedies for judicial review, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 177–178.

For cases on termination of services, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1141–1179.

Case referred to

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 (folld)

Mathews George (Danaraj Mathews Jimmy & Sara) for the applicant.
N Shanmugam (Shanmugam & Gooi) for the respondent.

Kamalanathan Ratnam J:

GROUNDS OF JUDGMENT

Facts

[1] The respondent was an employee of the applicant. The respondent claimed that he was unfairly dismissed by the applicant and therefore he commenced proceedings in the Industrial Court which ruled that the respondent was dismissed without just cause and excuse. Rather than reinstating the respondent, the Industrial Court awarded backwages and commissions from the date of dismissal. The applicant obtained leave to apply for an order of certiorari to quash the order of the Industrial Court.

FINDINGS OF THE COURT

Respondent's refusal to go on transfer

[2] The first ground on which the applicant launched this judicial review was on the basis that the respondent had refused to comply with a transfer

order ordering him to report for duty at the branch office at Johor Bahru. The respondent however justified his refusal on the ground that he was not paid his sales commission since 1995 and his February salary for 1997 and his EPF contributions which the company had asked him to pay first. The Industrial Court ruled that the respondent was right in not going on the transfer because he was not paid his dues.

[3] Before me, the applicant argued that the Industrial Court erred in arriving at its conclusion because an employer has the power to transfer its employees at its absolute discretion. That may be so, but surely, in this case if the applicant was sincere in its transfer order with no malicious intent motivating it, then there was no reason why the applicant had withheld the respondent's due commissions and salary, besides asking the respondent to advance first the employer's share of the EPF contribution. In fact the respondent had, by a letter dated 15 March 1997 and as a final request, asked for the release of his salary and sales commission. Counsel for the applicant submitted that the applicant had indeed by its letters dated 17March 1997 and 3 April 1997, acknowledged that moneys were due to the respondent and that the same would be paid to the respondent when he reported for work at Johor Bahru. For the purposes of considering the effectiveness of this argument, it is necessary to reproduce the last lines of the two letters. The last line of the letter dated 17 March 1997 reads, 'We will reimburse you your six months incentives at GA in Johor Bahru'. The last line of the letter dated 3 April 1997 reads, 'We will reimburse your claims in our office here'.

[4] The *Concise Oxford Dictionary* (9th Ed) defines 'reimburse' as 'repay (a person who has expended money); repay (a person's expenses)'. To my mind, the two letters merely give the impression that the applicant would reimburse the respondent his expenses incurred in the transfer from Penang to Johor Bahru. If the applicant had actually intended to refer to the sales commission due from 1995 and the February salary for 1997, then there is no reason why the word 'reimburse' was used. The letter should have said that the due sales commissions and the February salary would be paid in Johor Bahru.

[5] Any ambiguity must be construed in the respondent's favor. The respondent was justified in refusing to go on the transfer until all his dues had been paid more so upon the ambiguous letters of the applicant to the respondent which failed to state with clarity that all dues due to the respondent would be paid when he reported for duty at Johor Bahru.

Did the respondent resign or was he dismissed

[6] The applicant contended that the respondent had voluntarily resigned whereas the respondent refutes this. To consider this issue, it is necessary to reproduce the brief letter of resignation from the respondent to the applicant. It reads as follows:

Tony Yong Toong Wah

11, Jalan Gangsa

Bagan Ajam

13000 Butterworth

22 April 1997

The Management,

Goldart Sdn Bhd

Dear Sir,

Ref: Letter of Resignation

I hereby wish to tender my resignation with effect from today's date.

I take this opportunity to thank the company for all the assistance during my tenure of employment.

Yours faithfully,

(Sgd.)

Tony Yong

[7] It was the respondent's case that whilst he had admitted that the said letter bore his signature, he however contended that he was forced to sign a blank piece of paper in 1995 or 1996. The Industrial Court accepted the respondent's evidence on this.

[8] The applicant however contends that no reasonable person, more so an experienced employee like the respondent would sign a blank piece of paper. The applicant also complained that the Industrial Court failed to appreciate that a party who signed any document was bound by the contents of the said document.

[9] The purported letter of resignation was dated 22 April 1997 and the resignation was to take effect that very day. However, evidence was led that the respondent had worked till 26 April 1997. The respondent gave evidence that as usual he had reported for work on 27 April 1997 but found that his punch card had been removed.

[10] The respondent's evidence was that he was not aware of his purported resignation until 24 April 1997 when he received the applicant's letter accepting his resignation. The respondent had, the very next day, replied stating that he had never written such a letter. Whilst admitting that the signature on the said resignation letter was his, the respondent denied that he had sent the said letter.

[11] I agree and accept the reasoning of the Industrial Court on this issue. Why would the respondent continue to report for work if he had tendered

his resignation on 22 April 1997 and with immediate effect more so when considering the applicant's evidence that the respondent had tendered his resignation because he wanted to avoid action being taken against him for non-performance and for refusing to go on transfer.

[12] It is my judgment that for the reasons propounded by the applicant, it does not make sense for the respondent to continue to work, knowing that he could get into trouble and further having already tendered his resignation with immediate effect. Further to compound the issue, the applicant did not reply to the letter dated 25 April 1997 from the respondent denying that he had resigned and did not also take any action to recover the one month's salary from the respondent in lieu of one month's notice of intention to resign.

[13] The respondent explained that sometime in 1995 or in the beginning of 1996 he was asked to sign on a blank piece of paper together with other colleagues in Johor Bahru. One Jessica Poh, the secretary to the chairman had persuaded him to sign on the blank piece of paper. She had told him that everyone had to sign or the boss would make him leave the company. This evidence was corroborated by one Tham Wong Fak who had previously worked for the applicant and who had to also sign on a blank piece of paper at the request of the same Jessica Goh who had also told him that he would lose his job if he did not sign the said blank piece of paper.

[14] It is obvious that the applicant had used the respondent's pre-signed blank sheet of paper as the respondent's resignation letter. I therefore held that the respondent had not resigned voluntarily but that he was dismissed.

Respondent's poor work performance

[15] The applicant had in its pleadings and in its evidence contended that the respondent's work performance was poor. The applicant's evidence was that the respondent's sales performances were not up to par. In fact the applicant issued the transfer order to Johor Bahru because it wanted the respondent to get training from senior staff at Johor Bahru. With such admission, the plea that the poor work performance of the respondent was one of the grounds for dismissal cannot hold water. After all, the applicant was willing to continue to employ the respondent, albeit, in Johor Bahru.

[16] If the work performance was a factor and if the respondent was incorrigible and incapable of bettering himself, then the respondent ought not to have been subjected to the transfer to Johor Bahru, but instead his poor work performance ought to have been a factor for his immediate dismissal in Penang itself. The very fact that the applicant wanted the respondent to go to Johor Bahru to undergo the training meant that the applicant had appreciated the fact that the respondent would improve in his work performance with enhanced training.

[17] I am of the view that the Industrial Court was correct when it held that 'non-performance is not the issue here. It was only given as a possible excuse of why the claimant had resigned'. The question of the respondent's non-performance is certainly not an issue for dismissal in this case.

[18] It is appropriate for a judge of the High Court to bear in mind the salutary advice of the Federal Court as stated in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753. This is what Mohd Azmi Kamaruddin FCJ said at p 757:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could, reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively are so devoid of any plausible justification that no reasonable person or body of persons could have reached them.

[19] In the circumstances, I had no hesitation in dismissing the applicant's call for judicial review of the decision of the Industrial Court, with costs.

Application dismissed with costs.

Reported by M Maheswaran